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IN THE COURT OF APPEALS OF INDIANA

IN RE: THE TERMINAION OF THE PARENT – CHILD RELATIONSHIP OF J.R., K.M., and S.M.,	)	
Cecilia M.,	)	
Appellant-Respondent,	)	
vs.	)	No. 02A03-0803-JV-120
ALLEN COUNTY DEPARTMENT OF CHILD SERVICS,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Lori K. Morgan, Magistrate
The Honorable Charles F. Pratt, Judge
Cause Nos. 02D07-0505-JT-64
02D07-0505-JT-65
02D07-0505-JT-66

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Cecilia M. ("Mother") appeals the trial court's order terminating her parental rights with respect to J.R., K.M., and S.M (referred to collectively as "the Children"). Mother argues that insufficient evidence supports the trial court's finding that the children had been removed from her care for the statutorily required period of time. Concluding sufficient evidence exists, we affirm.

Facts and Procedural History

This appeal is atypical of most appeals challenging a termination of parental rights, as Mother does not challenge any of the trial court's findings or conclusions regarding her fitness as a parent. Instead Mother challenges the trial court's judgment based solely on the grounds that the Children were not removed from her care for a sufficient amount of time prior to the date on which the Allen County Department of Child Services (the "DCS") filed its petition to terminate her parental rights. Therefore, a detailed fact statement regarding the reasons that led the DCS to file its petition is unnecessary to our opinion.

On November 24, 2003, the DCS removed the Children from Mother's care. On November 26, 2003, the trial court found probable cause that the Children were children in need of services ("CHINS") and ordered them placed in foster care. On December 11, 2003, the trial court held a detention hearing and placed the children with Mother. On February 17, 2004, the DCS again removed the Children from Mother. On February 19, 2004, the trial court again found probable cause that the Children were CHINS and ordered that the Children be placed in foster care. The Children had not been returned to Mother's care when, on May 11, 2005, the DCS filed three petitions for termination of parental rights. In this

petition, the DCS alleged that the Children had been removed from Mother's care for "not less than fifteen (15) of the most recent twenty-two (22) months." Appellant's Appendix at 32, 36, 39. The DCS also alleged a reasonable probability existed that the conditions that led to the Children's removal would not be remedied, the continuation of the parent-child relationship posed a threat to the Children's well-being, termination was in the Children's best interests, and the DCS had a satisfactory plan for the Children's treatment.

On September 22, 2005, the trial court held a permanency plan hearing. On August 17, 2006, the Children were returned to Mother's care. However, just two weeks later, on August 31, 2006, the DCS again removed the Children. On September 6, 2006, the trial court entered a permanency plan of termination of parental rights and adoption. On February 28, 2007, the trial court held a review hearing, thereafter finding that Mother had not complied with the parent participation plan, that the conditions that led to the Children's removal were not likely to be corrected, and that the DCS's efforts to prevent removal had been unsuccessful due to Mother's failure to cooperate with family services. The trial court scheduled the termination hearing for April 10 and 17, 2007, and a permanency hearing for August 8, 2007. On April 10, April 17, and August 17, 2007, the trial court held a fact-finding hearing on the DCS's petitions. On November 27, 2007, the trial court entered judgments terminating Mother's parental rights.[1] The only factual finding at issue here is

[1] Although we recognize that our trial courts typically face tremendous caseloads, we note our dismay at the length of time taken to complete these proceedings. The record does not make clear why a four-month delay was necessary between the second and third fact-finding hearing or why the trial court's order was not issued until more than three months after the final fact-finding hearing. In all, the trial court issued its order terminating Mother's parental rights two-and-one-half years after the DCS filed its termination petition and three years and nine months after the Children were first removed from Mother's care. We have repeatedly espoused the goal of ensuring that children achieve a sense of stability and are not left in limbo regarding their

that the Children had "been removed from [their] parents for at least six (6) months under Dispositional Decree of the Allen Superior Court, dated April 22, 2004." Appellant's App. at 12, 19, 26. Mother now appeals.

Discussion and Decision[2]

A parent has a constitutional right to raise his or her children, but this right is "not absolute and must be subordinated to the children's interests when the children's emotional and physical development is threatened." A.F. v. Marion County Office of Family & Children, 762 N.E.2d 1244, 1249 (Ind. Ct. App. 2002), trans. denied. Although parental rights are afforded constitutional protections, these rights may be terminated when parents are unable or unwilling to meet their parental responsibilities. In re R.S., 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), trans. denied. We do not terminate these rights to punish a parent, but to protect a child. Id. When reviewing a termination of parental rights, we neither reweigh evidence nor judge witness credibility; instead we consider only the evidence most

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biological parents' parental status. See Castro v. State Office of Family and Children, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) (citing the child's "need of stability and permanency now" as a justification for terminating the father's parental rights), trans. denied; In re Involuntary Termination of Parental Rights of S.P.H., 806 N.E.2d 874, 883 (Ind. Ct. App. 2004) (recognizing that we will not "force [children] to wait while determining if [a parent] would be able to be a parent for them"); In re J.W., 779 N.E.2d 954, 963 (Ind. Ct. App. 2002) (recognizing that making a child "a ward of the state indefinitely is not in [the child's] best interests"), trans. denied. Unfortunately, it does not appear that this goal was met in this case.

[2] On May 8, 2008, Mother filed a motion to strike the DCS's appendix, arguing that it violates Appellate Rule 50B(2), and (3). We note that there is no such appellate rule. However, the motion indicates that Mother was objecting to the DCS including in its appendix documents that were not introduced at trial. This motion indicates that a copy was served upon counsel for the DCS. On May 30, 2008, the DCS filed a motion to strike Mother's motion to strike, alleging that counsel did not receive a copy of this motion. We have no way of knowing whether Mother properly served DCS's counsel. However, we strike the DCS's appendix on our own motion, as it clearly contains material that this court cannot consider. See In re Contempt of Wabash Valley Hosp., Inc., 827 N.E.2d 50, 57 n.6 (Ind. Ct. App. 2005) ("The appellate rules do not permit material to be included in a party's appendix that was not presented to the trial court."); Schaefer v. Kumar, 804 N.E.2d 184, 187 n.3 (Ind. Ct. App. 2004) ("It is well settled that matters outside the record cannot be considered by this court on appeal."), trans. denied.

favorable to the judgment and the reasonable inferences that can be drawn from the evidence. In re J.W., 779 N.E.2d 954, 959 (Ind. Ct. App. 2002), trans. denied.

The elements that must be proved by clear and convincing evidence in order to terminate a parent-child relationship are set out in Indiana Code section 31-35-2-4(b)(2):

> (A) one (1) of the following exists:
> (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
> (ii) a court has entered a finding under Ind. Code 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or
> (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
> (B) there is a reasonable probability that:
> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
> (i) the continuation of the parent-child relationship poses a threat to the well-being of the child;
> (C) termination is in the best interest of the child; and
> (D) there is a satisfactory plan for the care and treatment of the child.

Mother argues that insufficient evidence exists "to support the trial court's finding that the children had been removed from mother's care for at least 15 months of the most recent 22 months." Appellant's Brief at 2. However, the trial court did not find that the Children had been removed for such a period, and instead found that the Children had been removed for at least six months under a dispositional decree.

Subsection (A) is written in the disjunctive. Therefore, the DCS need introduce sufficient evidence to support only one of the conditions. In re B.J., 879 N.E.2d 7, 20-21 (Ind. Ct. App. 2008) ("The language of this statute is clear and unambiguous. It requires that the [DCS] allege and prove by clear and convincing evidence one of the three elements

delineated in subsection (b)(2)(A), which it did." (emphasis in original)), trans. denied; cf. In re S.L.H.S., 885 N.E.2d 603, 616 (Ind. Ct. App. 2008) (recognizing that subsection (B) of the statute is written in the disjunctive and requires the State to prove only one of the two requirements).

Mother does not argue that insufficient evidence supports the trial court's finding that the Children were removed for six months under a dispositional decree. Indeed, the uncontroverted evidence indicates that the Children were removed from Mother's care pursuant to a dispositional decree on February 19, 2004, see A.P. v. Porter County Office of Family and Children, 734 N.E.2d 1107, 1116 (Ind. Ct. App. 2000) (recognizing that "such a dispositional decree [as contemplated by the statute] is one that authorizes an out-of-home placement"), trans. denied, over fourteen months before the DCS filed its termination petition.[3]

Mother argues, however, that the DCS was required to prove that the Children were removed for at least fifteen of the previous twenty-two months, as the DCS made such an allegation in its petition. The DCS does not concede that it failed to support this allegation, but also argues that even if the children were not removed for fifteen of the previous twenty-two months, we should deem their petition amended to allege that the Children were removed for at least six months under a dispositional decree.[4] We agree with the DCS.

[3] The fact that the Children were returned to Mother for a two-week period after the filing of the petition does not alter the fact that the Children were removed for more than six months pursuant to a dispositional decree at the time the petition was filed. Cf. Matter of A.N.J., 690 N.E.2d. 716, 720-21 (Ind. Ct. App. 1997) (recognizing that, even though between the initial removal and the termination hearing the children had been returned to their father's care for a five-month period and to their mother's care for a nine-month period, the children had spent well over six months in foster care under a dispositional decree).

Under Indiana Trial Rule 15(B), "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The rationale behind this rule "is to promote relief for a party based upon the evidence actually forthcoming at trial, notwithstanding the initial direction set forth by the pleading." Curtis v. Clem, 689 N.E.2d 1261, 1264 (Ind. Ct. App. 1997). We have traditionally applied this rule liberally "to permit amendment of pleadings at any point in the proceedings where the parties have consented, as attested by the evidence admitted without objection, to a trial upon issues not raised by the pleadings." Midway Ford Truck Ctr., Inc. v. Gilmore, 415 N.E.2d 134, 137 (Ind. Ct. App. 1981). "[L]eave to amend should be given unless the amendment will result in prejudice to the opposing party." Criss v. Bitzegaio, 420 N.E.2d 1221, 1223 (Ind. 1981). "When a trial has ended without objection or qualification to its course, the evidence presented should control. The pleadings should not operate to deprive the trier of fact of its duty or finding the facts which the evidence permits." Davis v. Schneider, 182 Ind. App. 275, 278, 395 N.E.2d 283, 286-87 (1979). Citing a former statute, similar in substantive content to the current Trial Rule 15,[5] our supreme court explained: "[U]nless the respondent has been deprived of a substantial right, the form or

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[4] The fact that the DCS did not move at trial to amend their petition is immaterial. See Ind. Trial Rule 15(B) ("Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial on these issues.").

[5] Indiana Statute § 2-1068 (1968) stated:

> After trial and before final judgment, the court may, in its discretion and upon such terms as may be deemed proper for the furtherance of justice, order that any pleading be amended by correcting any mistake in name, description, legal effect, or in any other respect; or by inserting, striking out, or modifying any material allegation, in order that the pleadings may conform to the facts proved, where the amendment will not deprive a party of any substantial right.

theory of the petitioner's complaint should not be so binding as to preclude the trial court from allowing a recovery based on a different theory when fairly supported by evidence adduced at the trial." Morrison's S. Plaza Corp. v. S. Plaza, Inc., 252 Ind. 109, 122, 246 N.E.2d 191, 199 (1969); see also Foltz v. City of Indianapolis, 234 Ind. 656, 687, 130 N.E.2d 650, 665 (1955) ("It is elemental that upon appeal the pleadings will be deemed amended to conform to the evidence, findings and judgment, if the allegations of the pleadings do not entirely cover the scope of the issues presented by the evidence.").

At the hearings, the DCS presented a plethora of evidence indicating the Children had been removed pursuant to a dispositional decree for more than six months. E.g., State's Exhibit 11 (Order on Dispositional Hearing dated April 22, 2004, placing the Children with the DCS); State's Exhibit 17 (indicating that the children had been removed pursuant to a dispositional decree on April 22, 2004, and had been removed from the home for fourteen of the last twenty-two months as of May 5, 2005); April 17 transcript at 102 (DCS worker testifying that after the Children were removed from Mother's care in February 2004, Mother had the Children in her care for only two weeks). Mother did not object to the admission of any of this evidence. Mother also elicited testimony on cross-examination indicating that the children were not in her care for more than six months following the April 2004 dispositional order. See id. at 63-64 (DCS worker agreeing with Mother's counsel's question that the Children were out of Mother's care from February 2004 until August 2006). In short, evidence was admitted, without objection, showing that the Children were removed for at least six months pursuant to a dispositional decree, and Mother has failed to show any prejudice caused by our deeming the petition to be amended to allege as much. Under these

circumstances, we deem the petition amended to conform to the evidence and the trial court's findings. See McAfee v. State ex rel. Stodola, 258 Ind. 677, 680, 284 N.E.2d 778, 781 (1972) ("Under Trial Rule 15(B) we must deem the pleadings to be amended to conform to the evidence.").

Conclusion

We conclude sufficient evidence supports the trial court's judgment terminating Mother's parental rights.

Affirmed.

BAKER , C.J., and RILEY, J., concur.